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No. _____

IN THE

Supreme Court of The United States

ROBERT LEE GRAY,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER PETITIONER IS ENTITLED TO REPRESENTATION OF COUNSEL UNHAMPERED BY CONFLICT OF INTEREST.

II

WHETHER, AT THE VERY LEAST, PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM OF INADEQUATE REPRESENTATION DUE TO A CONFLICT OF INTEREST ON THE PART OF HIS ATTORNEY.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

ROBERT LEE GRAY, PETITIONER

v

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert Lee Gray, the Petitioner herein, prays, that a Writ of Certiorari issue to review the denial of appeal by the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on May 24, 1982 and the Court's denial of Petitioner's petition for rehearing and suggestion for rehearing en banc on July 14, 1982.

OPINIONS BELOW

The opinions of the Court are printed in Appendix A hereto, infra, pages

15 through 18.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied Petitioner's timely appeal on May 24, 1982 (Appendix A, infra, page 15). A timely petition for rehearing was denied on July 14, 1982 (Appendix A, infra, page 18). The jurisdiction of the Supreme Court is involved under Title 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The Sixth Amendment of the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On December 16, 1977, Petitioner and a certain Marie A. Patzig were arrested and charged with violation of Title 21 U.S.C. Section 941(a)(1), Possession of with intent to distribute a controlled substance.

Petitioner and Marie Patzig were both represented by Marie Patzig's attorney. Pursuant to the "stipulation relative to court trial" the Court was authorized, in determining guilt, to use all stipulations, evidence submitted at the

hearing of suppression of evidence, all memorandum in support thereof, and other matters of record before the United States District Court.

Pursuant to the Statement of Facts submitted by Appellant's attorney, "Marie A. Patzig after the search of Appellant's residence was arrested in December 16, 1977, with the probable cause being based on (1) the fact that approximately 219 grams gross weight of cocaine was discovered in her brown flight bag that she had identified to Agent Cameron, (2) the fact that the 1977 Chevrolet was rented to Patzig, and (3) the fact that 24.4 grams gross weight of cocaine was discovered in a Texas Instruments computer that also contained Patzig's social security card."

At the time that the stipulation was filed and discussed with Petitioner, he expressed concern as to the word "possess" in the stipulation because the

cocaine was brought in against his will.

The Court, in response to Petitioner's inquiries, asked if he knew the cocaine was in his home and he said "Yeah, when they told me."

The Court, then based on the stipulated facts, found Petitioner guilty of the charge.

On January 4, 1979, Petitioner filed a Notice of Appeal from the Judgment with the United States District Court for the Eastern District of California.

On August 7, 1980, judgment was affirmed.

A subsequent petition for a rehearing was filed and denied by this Court on September 9, 1980.

On October 27, 1980, Petitioner filed a motion for relief pursuant to Title 28 U.S.C. Section 2255 and Rule 35 of the Federal Rules of Criminal Procedure in the U.S. District Court.

On February 18, 1981, the U.S. District Court issued its partial denial of the motion for relief.

On April 28, 1982, the U.S. District Court denied the motion for relief.

On May 5, 1981, Petitioner filed his Notice of Appeal with the Ninth Circuit Court of Appeals.

On May 24, 1982, Petitioner's appeal was denied.

On July 14, 1982, Petitioner's motion for rehearing was denied.

On August 13, 1982, Petitioner's motion to vacate mandate was denied.

Among other points, Robert Lee Gray has maintained that he was represented by an attorney, James McCabe, who also represented a Marie Patzig who was arrested with Gray but released through Mr. McCabe's efforts. Mr. Gray has further maintained that Marie Patzig paid Mr. McCabe's legal fees. Mr. Gray's premise is that he agreed

to a stipulated set of facts which amounted to a plea of guilty on the advice of Mr. McCabe without the effective and impartial assistance of independent counsel.

Both the United States District Court and the Ninth Circuit Court of Appeals has consistently held that Gray is not entitled even to a full evidentiary hearing on this point.

The legal issue here is, of course, the right to representation free from conflict of interest under the Sixth Amendment to the Constitution of the United States. See Cuyler v. Sullivan (1980) 446 U.S. 335; Holloway v. Arkansas (1978) 435 U.S. 475, 481.

Indeed, the Ninth Circuit Court of Appeals has recognized that a defendant is entitled to a full evidentiary hearing on the issue of a conflict of interest. See Brown v. United States (1982) 665 F.2d 271.

The apparent problem in the instant case is whether there has been a sufficient demonstration of the conflict of interest.

It is submitted that the affidavit of Robert Gray, attached hereto as Exhibit 1 for the Court's convenience, read in light of the Supreme Court holdings under Sullivan - Holloway, supra, as more clearly spelled out in Wood v. Georgia (1980) 450 U.S. 261, meets the threshhold test.

This Court will recall that in Wood v. Georgia, supra, this Court held as follows:

> "Courts and commentations have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party..."
>
> "On the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the

employer who hired him. If this was the case, the due process rights of petitioners were not respected at the revocation hearing, or at earlier stages of the proceedings below. It is, however, difficult for this court to determine whether an actual conflict of interest was present, especially without the benefit of briefing and argument on this issue. Nevertheless, the record does demonstrate that the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further.[18]"

Footnote 18 in pertinent part holds as follows:

"Moreover, Sullivan mandates a reversal when the trial court

has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists."

The Supreme Court concluded as follows:

"For these reasons, we base our decision in this case on due process grounds. The judgment below is vacated and the case remanded with instructions that it be returned to the State Court of Fulton County. That court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that

there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests."

This conflict of interest claim was made by Gray on several occasions to the trial judge during the motion to vacate judgment (28 U.S. 2255).

REASONS FOR GRANTING WRIT

Petitioner has not and is not claiming that multiple representation alone or the possibility of a conflict of interest violates the Sixth Amendment to the Constitution of the United States of America.

However, Petitioner does claim that, at the very least, he was entitled to a full evidentiary hearing on his motion to vacate judgment (28 U.S. 2255) raising the issue of conflict of interest.

When an individual is persuaded by an

attorney to plead guilty when that attorney is being paid by a third party who is charged with the same crime and subsequently released, it cannot be seriously argued that an individual has received the protection and the rights accorded to him or her under the Sixth Amendment to the Constitution of the United States.

This is especially true in a situation where an individual had maintained his innocence and the only other individual to whom the controlled substances could have belonged was Marie Patzig.

CONCLUSION

It is submitted that Petitioner is entitled to an evidentiary hearing on his claim of conflict of interest.

Respectfully submitted,

CARL M. STEIN

CERTIFICIATE OF SERVICE

I, Carl M. Stein, a member of the Bar of this Court and counsel of record for petitioner, hereby certify that on this OCT 04 ~~day of September~~, 1982, I served three (3) copies of the foregoing "Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit" upon the Solicitor General, Rex E. Lee, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

CARL M. STEIN

I, Carl M. Stein, do hereby say as follows:

1. That on ~~September~~ OCT 04, 1982, I deposited in a United States Post Office with first class postage prepaid, and properly addressed to the United States Supreme Court, I mailed this Writ of Certiorari. Said mailing was done at the Federal Post Offices, 2801 Arden Way, Sacramento, California 95825.

Dated: ~~September~~ OCT 04, 1982.

CARL M. STEIN

Sworn to and subscribed before me on the above written date.

BETTY S. NAKAYAMA